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TALBOT, Appellant, *versus* JANSON, Appellee, *et al.*

THIS was a Writ of Error, in the nature of an Appeal, from the Circuit Court for the District of *South Carolina*; and the following circumstances appeared upon the pleadings:— A *Libel* was filed against *Edward Ballard*, Captain of an armed vessel, called *L'Ami de la Liberte*, on the Admiralty side of the District Court of *South Carolina*, in June, 1794, by *Joost Janson*, late master of the Brigantine *Magdalena* (then lying at *Charleston*, within the jurisdiction of the Court) in which it was set forth, that the Brigantine and her cargo were the property of Citizens of the *United Netherlands*, a nation at peace, and in treaty with the *United States of America*; that the Brigantine sailed from *Curacao*, on a voyage to *Amsterdam*; but, on the 16th of May, 1794, being about fifteen miles N. W. of the *Havanna*, on the west side of *Cuba*, she was taken possession of by *L'Ami de la Liberte*; that on the next day the Libellant met another armed schooner called *L'Ami de la Point a Petre*, commanded by Captain *Wm. Talbot*, on board of which the mate and four of the crew of the Brigantine *Magdalena* were placed; and that the two schooners, together with the Brigantine, sailed for *Charleston*, where the last arrived on the 25th of May, 1794. The Libellant proceeds to aver, that *Edward Ballard*, was a native of *Virginia*, a citizen and inhabitant of the *United States*, and a Branch Pilot of the *Chesapeake* and *Port Hampton*; that *L'Ami de la Liberte* is an *American* built vessel, owned by citizens of the *United States* (particularly by *John Sinclair*, *Solomon Wilson*, &c.) and was armed and equipped in *Chesapeake-Bay* and *Charleston*, by *Edward Ballard*, and others, contrary to the President's Proclamation, as well as the general law of neutrality, and the law of nations; that *Edward Ballard* had not, and could not legally have, any commission to capture, *Dutch* vessels, or property; that the capture was in direct violation of the 13th and 19th articles of the Treaty between

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tween *America* and *Holland*; and that a capture without a commission, or with a void commission, or as pirates, could not divest the property of the original, *bona fide*, owners, in whose favour, therefore, a decree of restitution was prayed.

On the 27th of June 1794, *William Talbot*, filed a claim in this cause; and, thereupon set forth, that he was admitted a Citizen of the *French Republic*, on the 28th December 1793, by the Municipality of *Point a Petre*, at *Guadaloupe*; and on the 2nd of January following, received a commission from the Governor of that island, as Captain of the schooner *L'Ami de la Point a Petre*, which was owned by *Samuel Redick*, a *French* citizen, resident at *Point a Petre*, since the 31st Dec. 1793, and had been armed and equipped at that place, as a privateer, under the authority of the *French Republic*. That the claimant being on a cruise, boarded and took the Brigantine, being the property of subjects of the *United Netherlands*, with whom the Republic of *France* was at war; and that although he found a party from *L'Ami de la Liberte*, on board the Brigantine, yet as they produced no commission, or authority, for taking possession of her, the Claimant sent her as his prize into *Charleston*, having put on board several of his crew to take charge of her, and particularly *John Remsen*, in the character of Prize Master, to whom he gave a copy of his commission. The Claimant, therefore, prayed, that the Libel should be dismissed with Costs.

On the 3d of July 1794, the libellant filed a *Replication*, in which he set forth, that *Wm. Talbot*, the claimant, is an *American* citizen, a native and inhabitant of *Virginia*; that his vessel (formerly called "the *Fairplay*") is *American* built, was armed and equipped in *Virginia*, and is owned in part, or in whole, by *John Sinclair*, and *Solomon Wilson*, *American* citizens, and *Samuel Redick*, also an *American* citizen, though fraudulently removed to *Point a Petre*, for the purpose of privateering. That *J. Sinclair* had received large sums as his share of prizes, and Captain *Talbot* had remitted to the other owners, their respective shares. That there is a collusion between Captains *Talbot* and *Ballard*, whose vessels are owned by the same persons, and sailed in company from *Charleston*, on the 5th of May, 1794.

On the 5th July, 1794, *William Talbot* added a duplicate to his claim, in which he protested against the jurisdiction of the court; insisted that even if there had been a collusion between him and Capt. *Ballard*, it was lawful as a stratagem of war; and averred that *John Sinclair* was not the owner of the privateer, that *Samuel Redick* was sole owner, and that he never had paid any prize money to *John Sinclair*.

On the 6th of August, 1794, the DISTRICT COURT decided in favor of its jurisdiction, dismissed the claim of Captain *Talbot*,

*Talbot*, and decreed restitution of the brigantine and her cargo to the libellant for the use of the *Dutch* owners. An appeal was instituted, but in *October* Term, 1794, THE CIRCUIT COURT affirmed the decree of the District Court; and allowed two guineas *per diem* for damages, and 7 per cent. on the proceeds of the cargo (which had been sold under an order of the court) from the 6th of *August* 1794, with \$2 dollars costs. Upon this affirmance of the decree of the District Court, the present writ of error was founded. It may be proper to add, that Captain *Ballard* had been indicted in the district of *Charleston* on a charge of piracy; but was acquitted agreeably to the directions given to the jury by Mr. Justice WILSON, who presided at the trial.

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From the material facts, which appeared upon the depositions and exhibits accompanying the record, the following circumstances were ascertained:

1st. In relation to the citizenship of Captain *Talbot* and the property of the vessel which he commanded, it appeared, that he was a native of *Virginia*, that he sailed from *America* in the close of *November* 1793, and arrived soon afterwards at *Point-a-Petre*, in the island of *Gaudaloupe*; that having taken an oath of allegiance to the *French* Republic, he was there naturalized by the municipality as a French citizen, on the 28th of *December* 1793, and that on the 2d of *January*, 1794, authority was given by the Governor of *Gaudaloupe* to *Samuel Redick*, to fit out the schooner, *L'Ami de la Point-a-Petre*, under Captain *Talbot's* command, *Redick* having entered into the usual security, as owner of the privateer. This schooner was built in *America*, called the "*Fairplay*," and had been owned by *John Sinclair*, and *Solomon Wilson*, American citizens; but she was carried to *Point-a-Petre*, by Captain *Talbot*, and there, on the 31st *December*, 1793, by virtue of a power of attorney from *Sinclair & Wilson*, dated the 24th of *November*, 1793, he sold her for 26,400 livres, as the bill of sale set forth, to *S. Redick*, who was a native of the *United States*, but had, also, been naturalized, (after an occasional residence for some time) as a citizen of the *French* Republic, on the same 28th of *December*, 1793. The bill of sale, also, stated that certain cannon and ammunition on board the vessel were included in the sale. The schooner, commanded by Captain *Talbot*, sailed immediately after this transaction, on a cruise, and had taken several prizes previously to the capture of the *Magdalena*. There was some slight evidence, also, to sanction an allegation, that of these prizes, taken subsequent to the sale of the vessel to *Redick*, a part of the proceeds had been paid by *Talbot* to the original owners, *Sinclair & Wilson*.

2d. In relation to the citizenship of Captain *Ballard*, and the property

1795. *property of the vessel* which he commanded, it appeared, that he was a native of *Virginia*; but that in the court of *Isle of Wight* county, of *April Term*, 1794, he had renounced, upon record, his allegiance to that State, and to the *United States*, agreeably to the provisions of a law of *Virginia*;\* though previously to the capture of the *Magdalena* he had not been naturalized in, (nor, indeed, had he visited) any other country. *L'ami de la Liberte* had been employed, but not armed, by the *French* Admiral, *Vanstable*, then lying with a fleet in the *Chesapeake*; and on the 13th *Germinal*, 1794, ( 1794,) he had given *Sinclair* a general commission to command her, as an advice, or packet boat. This commission, however, was assigned by indorsement from *Sinclair* to Capt. *Ballard*, the assignment was recognized by the *French* Consul at *Charleston*, on the 11th of *Floreal* (the of ) following; and a copy of it had been certified and delivered by Capt. *Ballard* to the prize-master of one of his prizes. There was full proof that *L'Ami de la Liberte* had received some guns from *L'Ami de la Point-a-Petre*, when they first met, by appointment, in *Savannah* river, and that she had been supplied with ammunition, &c. within the jurisdiction of the *United States*. It did not appear, that she had gone into any other than an American port, though she had made repeated cruizes, before the capture of the *Magdalena*; and there were strong circumstances to shew, that she was still owned by *Sinclair*, though she had been employed by Admiral *Vanstable*.

3d. In relation to the concert of the two schooners, and the capture of the *Magdalena*, it appeared, that before Capt. *Ballard's* vessel was fit for sea, it had been generally reported, and believed, and there was some evidence that *Sinclair* had declared, that she was destined as a concert, to cruize with Capt. *Talbot*; that Capt. *Talbot* had received a letter from *Sinclair*, directing him to proceed to *Savannah* river, and there wait for Capt. *Ballard*, in whose vessel *Sinclair* meant to sail; that, accordingly, some days afterwards Capt. *Ballard's* vessel hove in sight off *Savannah*, when Capt. *Talbot* said, "there is our owner, let us give him three cheers;" that both vessels went to

\* The words of the law are these: "Whensoever any citizen of this Commonwealth, shall, by deed in writing, under his hand and seal, executed in the presence of, and subscribed by, three witnesses, and by them, or two of them proved in the General Court, any District Court, or the court of the County or Corporation where he resides, or by open verbal declaration made in either of the said courts, to be by them entered of record, declare that he relinquishes the character of a citizen, and shall depart out of this Commonwealth, such person shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be deemed no citizen." *Passed 23d Dec. 1792.*

to *Tybee Bar*, and failed more than a mile above the light house, where four cannon and some swivels were taken from on board of Capt. *Talbot's* vessel, and mounted on board *L'Ami de la Liberte*; that *Sinclair* left the vessels in the river, and they soon after sailed together, as concerts, upon a cruize; and that, accordingly, before the capture of the *Magdalena*, they had jointly taken several prizes, and, particularly, the *Greenock*, which was taken by them on the 15th. of *May*, only two days before the capture of the *Magdalena*, and the *Fortune der Zee*, which was taken the very day after her capture. It appeared, that the *Magdalena* was first taken possession of by Capt. *Ballard*, who left a part of his crew on board of her; but Capt. *Talbot* was then in sight, and, coming up in about an hour afterwards, he, also, took possession of the brigantine, and placed a prize master and some of his men on board. The two privateers continued together for several days, making signals occasionally to each other; and, finally, Capt. *Ballard* alone accompanied the prize into *Charleston*.

The cause was argued by *Ingersoll*, *Dallas* and *Du Ponceau*, for the Appellant; and by *E. Tilghman*, *Lewis* and *Reed* (of *South-Carolina*) for the Appellee.

On the facts the controversy was—Whether the two schooners were, or were not, owned by *American* citizens? and were, or were not, illegally outfitted in the *United States*? The question of ownership turned upon the fairness and reality of the sale of *L'Ami de la Point a Petre*, to *Samuel Redick*; and the truth of the allegation, that *L'Ami de la Liberte*, had been purchased and commissioned by Admiral *Vanstabelle* for the service of the *French Republic*: And the question of illegal outfit, being conceded as to Captain *Ballard's* vessel, depended as to Captain *Talbot's* vessel, upon the circumstances, which have been recapitulated. On the law, the following positions were taken in favour of the Appellant\*.

I. That

\* Before the principal argument commenced, the two following points occurred:

I. The counsel for the Appellee, offered to give in evidence, a certificate of the collector of the customs of the port of *Charleston*, stating, that it appeared by his official books, that the duties on the cargo of the *Magdalena*, had been paid by the Appellee. But it was objected, for the Appellant, that the Collector's certificate could not be admitted to prove the fact; the entry itself from the record, must be exemplified. Besides, the Collector is not an officer appointed to certify a record; and as a witness, the opposite party should have had an opportunity to cross examine him. Independent, therefore, of any question, whether new evidence can be received on an appeal in this court, the certificate is inadmissible.

THE COURT rejected the certificate, on the general ground; and *WILSON, Justice*, added, that he thought, at all events, it was premature to offer the evidence in this stage of the cause. The motion was renewed after

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I. That the courts of the *United States* have no jurisdiction of the cause, because the capture of the *Magdalena* as prize, and carrying her in for adjudication, were acts performed under the authority of the *French Republic*; the subject of the capture is the property of an enemy of the *French Republic*; and, upon general principles, as well as by positive compact, the captor had a right to bring the prize into an *American* port. The commission of Captain *Talbot* is granted by a regular organ of the government of *France*, and if *France* recognises him as a citizen, (though *America* may have a right in the abstract, to controvert with *France* as a matter of state, the act of expatriation) no neutral power can contradict the fact for the purpose of trying the validity of the prizes of the Republic by a test, which is strictly municipal in every country, in substance, form, and operation. 1 *Com. Dig.* 269. The courts of a neutral country may undertake to determine questions of piracy; or questions of restitution, where (as in the case of *Glas et alversus the Betsey*, *ant.* p. 6.) the property of its own citizens, or of the citizens of another neutral nation, has been wrongfully seized, and brought within its jurisdiction; or questions arising from a violation of the neutral jurisdiction of the country, as in the case of the *Grange*, which was captured in the bay of *Delaware*; but no neutral power can determine a question of prize, upon a capture on the high seas by a belligerent power from his enemy. 4 *Inst.* 154. 2 *R.* 3 fol. 2. *Bynk.* 2. *J.* p. l. 1. 17. 2 *Wood.* 454. *Lee.* 211. *Sir L. Jenk.* 714. Thus, there is no *jus postliminium* in a neutral port; *Vatt. b.* 3. c. 14. f. 208. p. 84. and *America*, as a neutral power, cannot award restitution in this case, unless two things are established, 1st, that the Plaintiff is in amity with *America*, and 2d, that *France* is in amity with *Holland*. 4 *Inst.* 154. Besides, *France*, by the 17th article of the treaty, has a right to bring into, and carry from, an *American* port, all the prizes that she takes from her enemies. That the *Dutch* owners of the vessel were enemies of *France* is notorious; but, still, the vessel must be

after the court had affirmed the decree of the court below, but with no greater success.

II. It was objected by *Dallas*, for the Appellant, that the record was not transmitted, agreeably to the directions of the judicial act, the 19th section providing, that "it shall be the duty of Circuit Courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts, on which they found their sentence, or decree, fully to appear upon the record, &c." which had not been done. It is true, that the pleadings, exhibits, and sentences are certified by the clerk, not by the judges; and there may have been oral testimony in the inferior courts. *Reed*, answered, that every thing that had appeared below, now appeared here, under the seal of the Circuit Court.

After some discussion, however, the desire of the parties to obtain a decision on the merits, prevailed, and the objection was waved. The point has been since argued and decided, in the case of *Wiscart et al v. Dauchy*, *post.*

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be a prize, according to the law of nations, excluding captures within a neutral boundary, &c. That question, however, when the capture is made on the high seas, by a belligerent power of the property of his enemy, can only be decided by the courts of the country of the captors; and to examine the right of the *French Republic* to issue a commission within her own dominions, to a person recognized and claimed by her as a citizen, is a direct attack upon the sovereignty and independence of *France*. It is urged, however, that Capt. *Talbot's* vessel was, in fact, an *American* privateer, illegally fitted out in an *American* port; the facts do not support either branch of the allegation; but even in that point of view, if there was a commission from the *French Republic*, the capture cannot be deemed piracy: and since passing the act of the 5th of *June* 1794, (3 *Vol.* p. 88.) there is a provision for punishing illegal outfits; but not for restitution of their prizes, taken under a foreign commission, by foreign subjects. Upon a capture under a commission, to a *French* citizen, indeed, whether he is a native citizen or naturalized, the thing must be the same in effect, to foreign neutral powers. Every writer supports this opinion, where the prize is carried *infra presidia*; and the *American* ports are *infra presidia* (a place of asylum and safety) for *French* prizes, by virtue of the treaty. But even if the commission had been given to an *American* citizen, it would have been consistent with the usage of nations;—every nation, (for instance, *Russia* and *England*) employing foreign officers and seamen in their privateers and ships of war; and *America* herself, it will be remembered, employed *La Fayette*, and a train of *French* officers, previous to her alliance with *France*. See 13 *Geo.* 2. c. 3. §. 1. 17 *vol.* *Stat. at Large* 358. *Lex Mer.* 318. *Citizenship de facto*, is enough for the object contemplated; and *England* provides that she herself may navigate her privateers, with three fourths foreign seamen. 13 *Geo.* 2 c. 3.

II. That *Samuel Redick* and Captain *Talbot* had expatriated themselves, and become *French* citizens; so that the former might lawfully own, and the latter might lawfully command, a *French* privateer, for the purpose of making prize of ships belonging to the enemies of *France*. The right of expatriation is antecedent and superior to the law of society. It is implied, likewise, in the nature and object of the social compact, which was formed to shield the weakness, and to supply the wants of individuals—to protect the acquisitions of human industry, and to promote the means of human happiness. Whenever these purposes fail, either the whole society is dissolved, or the suffering individuals are permitted to withdraw from it. There are two memorable instances of the expatriation of entire nations (independent of the general course of the patriarchial, or pastoral

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even while the practical administration of government was thus reformed, some portion of the ancient theory was preserved; and, among other things, the doctrine of perpetual allegiance remained, with the fictitious tenure of all lands from the Crown to support it. Yet, it is to be remembered, that whether in its *real origin*, or in its artificial state, *allegiance*, as well as fealty, rests upon *lands*, and it is due to persons. Not so, with respect to *Citizenship*, which has arisen from the dissolution of the feudal system; and is a substitute for allegiance, corresponding with the new order of things. Allegiance and citizenship, differ, indeed, in almost every characteristic. Citizenship is the effect of compact; allegiance is the offspring of power and necessity. Citizenship is a political tie; allegiance is a territorial tenure. Citizenship is the charter of equality; allegiance is a badge of inferiority. Citizenship is constitutional; allegiance is personal. Citizenship is freedom; allegiance is servitude. Citizenship is communicable; allegiance is repulsive. Citizenship may be relinquished; allegiance is perpetual. With such essential differences, the doctrine of allegiance is inapplicable to a system of citizenship; which it can neither serve to controul, nor to elucidate. And yet, even among the nations, in which the law of allegiance is the most firmly established, the most pertinaciously enforced, there are striking deviations that demonstrate the invincible power of *truth*, and the homage, which, under every modification of government, must be paid to the inherent rights of man. In *Russia*, the volunteers who supply the fleet with officers, or literary institutions with professors, are naturalized. In *Poland*, an American citizen has been made Chancellor to the Crown. In *France*, Mr. *Sartine*, who was Minister of Marine, and Mr. *Necker*, who was Minister of Finances, were adopted, not native, subjects. In *England*, two years service in the navy, *ipso facto*, endows an alien with all the rights of a native. These are tacit acknowledgments of the right of expatriation, vested in the individuals; for, though they are instances of adopting, not of discharging, subjects; yet, if *Great Britain* would (*ex gratia*) protect a *Russian* naturalized by service, in her fleet, it is obvious that she cannot do so without recognizing his right of expatriation to be superior to the Empress's right of allegiance. But it is not only in a negative way, that these deviations in support of the general right appear. The doctrine is, that allegiance cannot be due to two sovereigns; and taking an oath of allegiance to a new, is the strongest evidence of withdrawing allegiance from a previous, sovereign. Thus, *Louis XIV.* received his own *quondam* subjects, the two Fidlers, as Ambassadors. Dr. *Story*, an Englishman, was sent to *England* as the minister of *Spain*. And in many nations the conditions

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forms a fair object of municipal police; and a conspiracy, or combination, to leave a country, might, likewise be properly guarded against. Such laws would not be an infraction of the natural right of individuals; for, the natural rights of man are personal; he has no right to *will* for others, and he does so, in effect, whenever he moves the mind of another to his purpose, by fear, by fraud, or by persuasion. The *English* law and the law of *Pennsylvania*, therefore; punish kidnapping, and transporting, or seducing, artists, to settle abroad as crimes. 4 *Bl. Com.* 219. 160. *Penn. Laws* 2 Vol. *Dall. Edit.* But this is all the power on the subject, which a government ought to possess for its preservation. The depopulation of a country by the spontaneous co-operating will of numbers, proves nothing more than that a bad government exists, or a bad soil is inhabited. Such an event, however, is too remote a possibility, to be any where a subject of apprehension; and, with respect to *America*, it is visionary indeed! If then, the power of restraining emigration is not necessary to the existence of government, much may be urged to shew, that it is a power of too delicate a nature to be trusted by the people to the integrity of any government; since, by legislative regulations, the exercise of the right might be rendered so difficult, that the right itself would be put in everlasting abeyance. Nor is there any essential coincidence in a power to regulate naturalization, and in a power to regulate emigration; so that the grant of the former shall be deemed to include the latter. The idea of *admitting*, and the idea of *excluding*, are not analogous. As to the point of policy, if a man wishes to leave a country, he is not likely to remain in it, by force, beneficially to the state. The character of the migrating individual can have no influence on the right; his private motives of interest, or of pleasure, do not affect the community; and it is of no importance to what country he goes. The moment he has expatriated himself, the state is no longer interested, no longer responsible for his conduct; the legature, which bound them, is severed, and can never again be united, without their mutual consent: The emigrant has become an alien. But in the act of naturalization, every community has a right totally to reject applications for admission; or to prescribe the terms; and then the character of the applicant, the motives of emigration from his old country, and the evidences of attachment to his new one, are all to be considered. Let it, however, be supposed, for a moment, that the grant of the naturalization power embraces a power of regulating emigration, the question still remains, has the power of regulating emigration been exercised by Congress? And if it has not been exercised by the department of government, to which alone even by implication, it is granted, what authority has the

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court to interfere upon the subject? That the power has not been exercised by Congress is conceded; and if the court interferes, it will be a legislative, not a judicial, act: For, although it is contended, that the law of nations furnishes rules to supply the silence of the legislature, there is scarcely a subject, to which the jurisdiction of Congress extends, that might not, on the same doctrine, be regulated, without the interposition of that body. Thus, Congress has power to define and punish piracies, felonies committed on the high seas, and offences against the law of nations; and yet, without the exercise of that power, the law of nations would supply rules as applicable to those cases, as to the case of expatriation. But naturalization and expatriation are matters of internal police; and must depend upon the municipal law, though they may be illustrated and explained by the principles of general jurisprudence. It is true, that the judicial power extends to a variety of objects; but the Supreme Court is only a branch of that power; and depends on Congress for what portion it shall have, except in the cases of ambassadors, &c. particularly designated in the constitution. The power of declaring whether a citizen shall be entitled in any form to expatriate himself, or, if entitled, to prescribe the form, is not given to the Supreme Court; and, yet, that power will be exercised by the court, if they shall decide against the expatriation of Captain *Talbot*. Let it not, after all, be understood, that the natural, loco-motive, right of a free citizen, is independent of every social obligation. In time of war, it would be treason to migrate to an enemy's country and join his forces, under the pretext of expatriation. 1 *Dall Rep.* 53. and, even in time of peace, it would be reprehensible (say the writers on the law of nature and nations) to desert a country labouring under great calamities. So, if a man acting under the obligations of an oath of office, withdraws to elude his responsibility, he changes his habitation, but not his citizenship. It is not, however, private relations, but public relations; private responsibility, but public responsibility; that can affect the right: for, where the reason of the law ceases, the law itself must, also, cease. There is not a private relation, for which a man is not as liable by local, as by natural, allegiance;—after, as well as before, his expatriation: He must take care of his family, he must pay his debts, wherever he resides; and there is no security in restraining emigration, as to those objects, since, with respect to them, withdrawing is as effectual, as expatriating. Nor is it enough to impair the right of expatriation, that other nations are at war; it must be the country of the emigrant. No nation has a right to interfere in the interior police of another: the rights and duties of citizenship, to be conferred, or released, are matter of interior police; and, yet, if a foreign war could affect the

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the question, every time that a fresh power entered into a war, a new restraint would be imposed upon the natural rights of the citizens of a neutral country; which, considering the constant warfare that afflicts the world, would amount to a perpetual controul. But the true distinction, appears to be this:—The citizens of the neutral country may still exercise the right of expatriation, but the belligerent power is entitled to say, “the act of joining our enemies, *flagrante bello*, shall not be a valid act of expatriation.” By this construction, the duty a nation owes to itself, the sacred rights of the citizen, the law of nations, and the faith of treaties, will harmonize, though moving in distinct and separate courses. To pursue the subject one step further: A man cannot owe allegiance to two sovereigns. *1 Bl. Com.* he cannot be citizen of two republics. If a man has a right to expatriate, and another nation has a right and disposition to adopt him, it is a compact between the two parties, consummated by the oath of allegiance. A man’s last will, as to his citizenship, may be likened to his last will, as to his estate; it supercedes every former disposition; and when either takes effect, the party, in one case, is naturally dead, in the other, he is civilly dead;—but in both cases, as good christians and good republicans, it must be presumed that he rises to another, if not to a better, life and country. An act of expatriation, likewise, is susceptible of various kinds of proof. The *Virginia* law has selected one, when the state permits her citizens to depart; but it is not, perhaps, either the most authentic, or the most conclusive that the case admits. It may be done obscurely in a distant county court; and even after the emigrant is released from *Virginia*, to what nation does he belong? He may have entered no other country, nor incurred any obligation to any other sovereign. Not being a citizen of *Virginia*, he cannot be deemed a citizen of the *United States*. Shall he be called a citizen of the world; a human balloon, detached and buoyant in the political atmosphere, gazed at wherever he passes, and settled wherever he touches? But, on the other hand, the act of swearing allegiance to another sovereign, is unequivocal and conclusive; extinguishing, at once, the claims of the deserted, and creating the right of the adopted, country. Sir *William Blackstone*, therefore, considers it as the strongest, though an ineffectual, effort to emancipate a *British* subject from his natural allegiance; and the existing constitution of *France* declares it expressly to be a criterion of expatriation. The same principle operates, when the naturalization law of the *United States* provides, that the whole ceremony of initiation shall be performed in the *American* courts; and if it is here considered as the proof of adoption, shall it not be considered, also, as the test of expatriation? If *America*

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makes citizens in that way, shall we not allow to other nations, the privilege of the same process? In short, to admit that *Frenchmen* may be made citizens by an oath of allegiance to *America*, is, virtually; to admit, that *Americans* may be expatriated by an oath of allegiance to *France*. After this discussion of principles, forming a necessary basis for the facts in this case, it is insisted, 1st, That *Talbot* was a naturalized citizen of the *French Republic* at the time of receiving a commission to command the privateer, and of capturing the *Magdalena*. He left this country with the design to emigrate; and the act of expatriation must be presumed to be regular, according to the laws of *France*, since it is certified by the municipality of *Point a Pitre*, by the *French Consul*, and by the Governor of *Guadeloupe*. 2d, That *Redick* was also, a naturalized citizen of the *French Republic* when he purchased the vessel, and received a commission to employ her as a privateer. 3d, That *Ballard's* expatriation and commission, however doubtful, cannot affect *Talbot* and *Redick*. But still, it is objected, that these acts of expatriation, these commissions, are all fraudulent and void. In private contracts, in subjects of municipal regulation, in matters of *meum et tuum*, the rule is clear, that fraud vitiates every thing, and the fraud may be collected from circumstances. But is fraud to be presumed in a conflict of national rights? It is said, that a nation cannot be considered in the light of pirates; *1 Wood.* so a nation cannot commit frauds. Let the matter be turned as it may, it will rest on this ground,—had *France* any authority to naturalize, or to commission, *Talbot* and *Redick*? *America* is deeply interested, at least, in withholding a concession, that any other nation, but *France*, can decide that question. The validity of her own naturalizations, the authenticity of her own commissions, and the claims of her impressed seamen, are all involved. *France*, then, is exclusively to judge; she granted the authority, she can rescind it; she can punish any abuse of it; and to her government must be the appeal, if *America*, or any other nation, has sustained an injury by it. If, indeed, on the pretext of fraud in the persons who obtain a French commission, our courts may annul them, where will the inquisitorial censorship terminate? British patents of denization, as well as French acts of naturalization; and every commission of the officers of a public ship of war, as well as of a privateer, will be alike subject to our supreme controul. But even the allegation of fraud, is unsupported by any reasonable degree of evidence. The first circumstance relied on, is, that the acts of naturalization, bill of sale, and commission to cruise, were in the custody of Capt. *Talbot* on board the privateer, and not held by *Redick*, at *Point a Pitre*. But, surely, every privateer must be always ready to prove her ownership and authority

thority, to rescue her from the imputation of piracy, and to entitle her to sell her prizes. Again, it is said, that *Redick* had no agent in *America*. But it is sufficient to answer, that the Captain of a privateer is the natural agent for the owner; that it is idle to expect that the owner of a cruizing vessel shall have an agent in every port, at which she may touch; and that, in fact, *Redick* had several agents in *Charleston*. It is added, as circumstances for suspicion, that *Talbot* has not proved that his vessel was not fitted out in the *United States*, whereas the proof of the affirmative lay with Appellee; the articles on board *Talbot's* vessel, if not put on board at *Guadaloupe* might have been for trade; and *Redick*, a *bona fide* purchaser, ought not to be affected by an illegal outfit: 2 *Esp.* 282. 3 *Wood.* 213. *Bl. C.* 262. 1 *T. Rep.* 260. 3 *T. Rep.* 437. 2 *Wood.* 412. 431. *Hard.* 349. *Cowp.* 341. 2 *T. Rep.* 750. that proof is not made of notice of the sale to *Redick*, whereas it appears that *Sinclair* and *Wilson* were actually informed of the transaction; and that *Sinclair* and *Wilson* have not been produced as witnesses by the Appellant, whereas it was the duty of the Appellee, if he thought their testimony material, to examine them, and he had the same means to compel their attendance.

III. That the capture being made by Captain *Talbot*, notwithstanding the participation of Captain *Ballard*, the vessel is a lawful prize. If, indeed, *Talbot* and *Redick* were regularly naturalized by *France*, if the vessel was regularly sold to *Redick*, and commissioned by the *French* government, it is obvious that the validity of the capture can only be impeached, by the circumstance of Capt. *Talbot's* consorting with Capt. *Ballard*. That point may be considered in two ways: 1st, Considering Captain *Ballard* as acting under colour of a commission; 2d, Considering Captain *Ballard* as acting without any authority at all.—1st, The commission which *Ballard* held, was, at least, sufficiently colourable to justify *Talbot* the commander of a *French* privateer, in associating with him against the enemies of *France*. A general order, indeed, is a sufficient commission, where there is evidence a person intended to act under it. 2 *Vatt. f.* 224. 5. 6. But he not only held a commission, but he was employed by the *French* government itself, sailed under *French* colours, and in the character of a *French* vessel had been permitted freely to leave and enter the *American* ports. It is true, that it is eventually discovered that he had clandestinely fitted out his vessel, in violation of the laws of the *United States*; but *Talbot* had no right to question the validity of the commission, nor the legality of the outfit; and even supposing *Talbot* did assist in the outfit of *Ballard's* vessel, that, as a substantive offence, might render him amenable to punishment in our courts, but it could not vacate his *French* commission, nor render him, as a *French* citizen, a pirate throughout the world.

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The validity of the commission and the legality of the outfit are questioned, however, by a *Dutch* subject, before an *American* tribunal; and yet, such a plea would not be sustained in *France*, and could not be allowed even in *Holland*. With respect to *America* herself, whatever punishment she denounces, for a violation of her neutrality, she may inflict; but on principles of justice, she cannot convert one crime into another, an illegal outfit into piracy; she cannot punish for holding a commission, recognized by the authority that issued it; she cannot make an innocent man (for instance, *Redick*, the owner of the privateer) responsible for a guilty one; she cannot impair the right, or confiscate the property, of a man acting under a due authority, in order to punish a man acting without due authority; and she cannot punish a man for associating out of her jurisdiction, with another, contrary to her laws, but consistently with the laws of the country to which he belongs. But what more did *Talbot* do, than is justifiable on the principle of stratagem by the laws of war? It is illegal to outfit a vessel of war within the *United States* under colour of a *French* commission; and, yet, after the vessel is outfitted, and on the high seas, may not an officer of *France*, without vacating his commission, employ her? Foreigners are often retained as spies, and sometimes pressed into the service of a belligerent power. *Vatt. B. c. f. p. 593, 557. Grot. Puff. Heinec. 170.* Why may they not be employed as consorts in cruising? A colourable commission was deemed sufficient to rescue Captain *Ballard* from a conviction for piracy; and if for that purpose, it ought surely to be sufficient to save *Talbot*, or rather, indeed, *Redick*, the party really interested, from a charge of piracy, the forfeiture of his commission, and the loss of the prize. Where there is a commission, there can be no piracy. 2 *Woodes. 425. 2 Sir L. Jenk. 754. Moll. 64.* and capture by deputation under colour of a commission is no piracy, though the ship is carried into the port of a friend.—2 *Woodes. 426. Moll. B. 1. c. 4. f. 19. p. 65.* The case in 2 *Vern. 592*, quoted for the Appellee, is the case of *Englishmen*, acting as such, though under a *Savoy* commission, against friends of *England*; whereas the present case is that of an *American*, having lawfully expatriated himself, and after becoming a *French* citizen, receiving as such a commission, and making prize, in a *French* vessel, of the property of the enemies of *France*. But even on the point of the commission, it is said in the case that the prize might enure as a droit of Admiralty, on the principle of capture from an enemy, by an uncommissioned vessel. 2 *Woodes. 433.* And there are some authorities that go the length of saying that capture by a neutral, where there is a commission, is good. *Lex Merc. 227. Com. Dig.*



269. 2d. But let it be supposed, in the second place, that captain *Ballard* had no authority at all, this will not destroy captain *Talbot's* right of capture. A piratical capture does not, it is agreed, alter the property; 2 *Wood*. 428 to 431. and as *Ballard*, in that case, had no right to seize the vessel, it still remained the property of the *Dutch* owners, liable to be seized any where by the *French*, their public enemies. *Vatt. B. c. f. p. Burl.* 219, 222, 225. *Lee on Capt.* 206. 2 *Val.* 261. If, indeed, a friend's property is retaken from a pirate, the friend shall only pay salvage; but if an enemy's property is so retaken, the right becomes entire and absolute in the re-captor. It would be war in a neutral country, say the authorities, to secure within her territory the spoils of one of the Belligerent parties; and is it not a greater partiality, a more striking aggression, to attempt to do so on the high seas? It can only be by an extension of her neutral jurisdiction, that the *United States* can pretend to invalidate the capture, because the property was in the possession of *Ballard*, an *American* citizen; and surely, the unlawful act of her own citizen can give no right or authority to the *United States*, at the expence of the right and authority of a foreign nation. If, upon the whole, *Ballard* had a colorable commission, it justified *Talbot*; if he had no commission, his misconduct on the high seas, cannot add to the safety of the property of the *Dutch*, nor enlarge the jurisdiction and power of the *United States*; and even if *Talbot* had consorted with *Ballard*, an avowed pirate, the prize would be good as a droit of the *French* Admiralty, though perhaps neither of the captors. acquired a property in it. *Lex Merc.* 246, *Moll. b. 1, f. 10.* The facts, then, are briefly, that the two cruizers were in company when they first saw the *Magdalena*; that, for their mutual interest, they afterwards separated to pursue separate vessels, that both were again in sight, however, when the prize was captured, that both took possession of her, and that both were in possession on her arrival in the port of *Charleston*. The force of one joint cruizer is the force of both; and, like joint tenants, the possession of one is the possession of both. It cannot be said, that she was first captured by *Ballard*; for, when two ships are in sight, both are considered as captors; both entitled to share in the prize. 2 *Wood*. 447, *Moll. b. 1, c. 2, f. 22.* 2 *Leon.* 182, *Doug.* 324, 328, and, therefore, on that footing, if *Ballard* was not entitled, either the whole prize vested in *Talbot*, or *Ballard's* share was a droit of the Admiralty of *France*; but *America* could have no pretence to hold, or release, any part of it. 2 *Wood.* 432. 3. 441. 456. 2 *Vern.* 592.

The Counsel for the Appellees insisted upon the following points: 1st. That the capturing vessels were *American* property.

1795. ty. 2d. That even if the vessels were *French* property, the instruments, or agents, used to effect the capture, were *American* citizens. 3d. That both vessels were of *American* outfit, and, therefore, the capture was illegal. 4th. That, at all events, *Ballard* acquired no right by the capture, and that *Talbot*, coming in under him, could have no higher pretensions than *Ballard* himself. From this view, it will be perceived that the course of their argument led principally to an investigation of the facts; whence concluding, that the whole transaction was collusive and fraudulent, on the part of the owners and captains of the vessels, they cited authorities to shew, that fraud vitiates every act, and that although fraud cannot be presumed, it may be proved by circumstances. 3 *Cha. Ca. Wils.* 230. 3 *Co.* 778. 81. 1 *Burr.* 391. 396, 4 *T. Rep.* 39.

On the points of law, the Counsel for the Appellee, held the following doctrines:

1. That *Ballard* and *Talbot* were *Americans* by birth, and had done nothing which could work a lawful expatriation. It is conceded that birth gives no property in the man; but, on the principles of the *American* government, he may leave his country when he pleases, provided it is done *bona fide*, with good cause, and under the regulations prescribed by law. 1 *Vatt. B.* 1 c. 19. f. 220. 221. 223. 224. *Grot. B.* 2. c. 5. f. 24. *Puff. B.* 8. c. 11. p. 872, and provided, also, that he goes to another country, and takes up his residence there, under an open and avowed declaration of his intention. Thus, the rule is fairly laid down in 2 *Heinec. B.* 2. c. 10. f. 230. p. 220; requiring from the emigrant not only an act of departure, with the design to expatriate, but the act of joining himself to another state. But a man may be entitled to the right of citizenship in two countries; and proving that he is received by a new country, is not sufficient to prove that his own country has surrendered him. If, indeed, it is lawful for one individual, any number of individuals, may exercise the right of expatriation under the circumstances contended for; and, then, we might behold a political monster, all the citizens of a country at war, though the country itself is at peace. There must, therefore, from the nature of the case, be some restraint on this loco-motive right: and it is a reasonable restraint, recognized by the best writers, that it shall not be exercised either in contravention of a national compact, such as the *American* treaty with *Holland*, which declares that the citizens of either party shall not take commissions as privateers against the other. *Art.* 19. or to the injury of the emigrant's country. *Vatt. b.* 2. c. 6. f. 71 to 76. Privateering by the subjects of a neutral nation, is considered as an infamous practice. *Ibid. b.* 3. c. 15. f. 229. and if an act committed

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committed by a citizen is approved and ratified by his country, they adopt the offence as their own. *Ibid. b. 2. c. 6. f.* 74. The power of regulating emigration, is an incident to the power of regulating naturalization. It is vested exclusively in Congress; and the *Virginia* Act, under which *Ballard* pretends to have renounced his allegiance, can have no effect on the political rights of the Union. With respect to *Talbot*, his pretended expatriation was in itself an offence, and, therefore, cannot be a justification: he sailed from *America* in an armed vessel, illegally fitted out, with the design of becoming a privateer, against a nation in peace and treaty with the *United States*; and the sale of his vessel to *Redick*, was merely a colour to the general scheme of plunder and depredation, in which *Redick* was a partaker. If, then, *Talbot* is to be still considered as an American citizen, acting under a *French* commission, in capturing a *Dutch* prize, restitution must be awarded upon the principle of the decision in 2 *Vern.* 592. *Holland* being at peace with *America*, though she is at war with *France*.

2. That even supposing *Talbot's* expatriation, and the ownership of his vessel, to be sufficient to authorize his own privateering, the circumstances of consorting with *Ballard*, knowing the American character of *Ballard* and his vessel, were sufficient to invalidate the capture. Can it be reasonable, or just, that a *French* privateer should associate with a pirate, or avail himself of the power of *America*, to seize the property of her allies, bring that property into an American port, and, yet, that an American court of justice should be incompetent to redress the grievance? But the actual capture was made by *Ballard*, whose right of capture is abandoned. The tortious act had been completed before *Talbot* was admitted by a fraudulent concert, into a share of the possession of the vessel; and even when admitted, he does not pretend to defeat the previous occupancy, or to controvert *Ballard's* claim of prize. *Ballard*, (possessed by assignment of a commission, which did not authorize capture, and which was not, in its nature assignable) had wrongfully seized the vessel of an American friend; and, surely, if at the time of such seizure, and before *Talbot* boarded the vessel, the *Dutch* owners had a right to demand justice from the *United States*, as against *Ballard*, that right could not be destroyed by any immediate consequence of the wrong on which it was founded; such as *Talbot's* being admitted by the aggressor to a joint possession. Besides, *Talbot* assisted in arming *Ballard's* vessel within the neutral jurisdiction of the *United States*; and this, together with the concert in capturing the *Magdalena*, amounted to a relinquishment, or forfeiture, of his commission.

3. That neither the law of nations, nor the treaty between  
*America*

1795. *America and France*, prevents the interference of the judicial authority of the *United States*, in this case; and it has already been adjudged, that the District Court has Admiralty jurisdiction, both as a Prize and Instance Court. *Ant. p. 6.* It is enough to repel the argument founded on the law of nations, to state, that the question is not, whether the court will take cognizance of a capture, made on the high seas, by the citizens of *France*, of the property of the enemies of that Republic, which is a question that can only be decided by the courts of the captor: but the gist of the controversy is—whether American citizens shall be permitted, under the colour of a foreign commission, to make prize of the property of the friends of *America*, either by their own independent act, or in collusion and concert with a real *French* privateer? As to the 17th article of the treaty with *France*, giving it a fair and rational exposition, it cannot include prizes taken by privateers unlawfully equipped in the American ports; and the vessels taken as prize, must not only belong to the enemies of *France*, but be such as are taken *bona fide* by the citizens of *France*; which was not the fact in the present instance.

On the 22d of *August*, 1795, the Judges delivered their opinions *seriatim*.

PATERSON, *Justice*.—The libel in this cause was exhibited by *Joost Fanjen*, master of the *Vrouw Christiana Magdalena*, a Dutch brigantine, owned by citizens of the *United Netherlands*; and its prayer is, that *Edward Ballard*, and all others, having claim, may be compelled to make restitution. The District Court directed restitution; the Circuit Court affirmed the decree; and the cause is now before this court for revision. The *Magdalena* was captured by *Ballard*, or by *Ballard* and *Talbot*, and brought into *Charleston*. The general question is, whether the decree of restitution was well awarded. In discussing the question, it will be necessary to consider the capture as made,

1. By *Ballard*.

2. By *Ballard* and *Talbot*.

1. By *Ballard*. This ground not being tenable, has been almost abandoned in argument. It is, indeed, impossible to suggest any reason in favor of the capture on the part of *Ballard*. Who is he? A citizen of the *United States*: For, although he had renounced his allegiance to *Virginia*, or declared an intention of expatriation, and admitting the same to have been constitutionally done, and legally proved, yet he had not emigrated to, and become the subject or citizen of, any foreign kingdom or republic. He was domiciliated within the *United States*, from whence he had not removed and joined himself to any other country, settling there his fortune, and family.

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From *Virginia*, he passed into *South Carolina*, where he sailed on board the armed vessel called the *Ami de la Liberte*. He sailed from, and returned to, the *United States*, without so much as touching at any foreign port, during his absence. In short, it was a temporary absence, and not an entire departure from the *United States*; an absence with intention to return, as has been verified by his conduct and the event, and not a departure with intention to leave this country, and settle in another. *Ballard* was, and still is, a citizen of the *United States*; unless, perchance, he should be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times. If however, he be a citizen of the world, the character bespeaks universal benevolence, and breathes peace on earth and good will to man; it forbids roving on the ocean in quest of plunder, and implies amenability to every tribunal. But what is conclusive on this head is, that *Ballard* sailed from this country with an iniquitous purpose, *cum dolo et culpa*, in the capacity of a cruiser, against friendly powers. The thing itself was a crime. Now it is an obvious principle, that an act of illegality can never be construed into an act of emigration, or expatriation. At that rate, treason and emigration, or treason and expatriation, would, in certain cases, be synonymous terms. The cause of removal must be lawful; otherwise the emigrant acts contrary to his duty, and is justly charged with a crime. Can that emigration be legal and justifiable, which commits or endangers the neutrality, peace, or safety of the nation of which the emigrant is a member? As we have no statute of the *United States*, on the subject of emigration, I have taken up the doctrine respecting it, as it stands on the broad basis of the law of nations, and have argued accordingly. That law is in no wise applicable to the present case: for, *Ballard*, at the time of his taking the command of the *Ami de la Liberte*, and of his capturing the *Magdalena*, was a citizen of the *United States*; he was domiciliated within the same, and not elsewhere; and, besides, his cause of departure, supposing it to have been a total departure from and abandonment of his country, was unwarrantable, as he went from the *United States*, in the character of an illegal cruiser. The act of the legislature of *Virginia*, does not apply. *Ballard* was a citizen of *Virginia*, and also of the *United States*. If the legislature of *Virginia* pass an act specifying the causes of expatriation, and prescribing the manner in which it is to be effected by the citizens of that state, what can be its operation on the citizens of the *United States*? If the act of *Virginia* affects *Ballard's* citizenship, so far as respects that state, can it touch his citizenship so far as it regards the *United States*? Allegiance to a particular state, is one thing;

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allegiance to the *United States* is another. Will it be said, that the renunciation of allegiance to the former implies or draws after it a renunciation of allegiance to the latter? The sovereignties are different; the allegiance is different; the right too, may be different. Our situation being new, unavoidably creates new and intricate questions. We have sovereignties moving within a sovereignty. Of course there is complexity and difficulty in the system, which requires a penetrating eye fully to explore, and steady and masterly hands to keep in unison and order. A slight collision may disturb the harmony of the parts, and endanger the machinery of the whole. A statute of the *United States*, relative to expatriation is much wanted; especially as the common law of *England*, is, by the constitution of some of the states, expressly recognized and adopted. Besides, ascertaining by positive law the manner, in which expatriation may be effected, would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point.

But there is another ground, which renders the capture on the part of *Ballard*, altogether unjustifiable. The *Ami de la Liberte* was built in *Virginia*, and is owned by citizens of that state; she was fitted out as an armed sloop of war, in, and, as such, sailed from, the *United States*, under the command of *Ballard*, and cruised against, and captured vessels belonging to, the subjects of *European* powers, at peace with the said states. Such was her predicament, when she took the *Magdalena*. It is idle to talk of *Ballard's* commission; if he had any, it was not a commission to cruise as a privateer, and if so, it was of no validity, because granted to an *American* citizen, by a foreign officer, within the jurisdiction of the *United States*. We are not, however, to presume, that the *French* Admiral or Consul would have issued a commission of the latter kind, because it would have been a flagrant violation of the sovereignty of the *United States*; and of course incompatible with his official duty. Therefore, it was not, and, indeed, could not, have been a war commission. It is not necessary, at present, to determine, whether acting under colour of such a commission would be a piratical offence? Every illegal act, or transgression, committed on the high seas, will not amount to piracy. A capture, although not piratical, may be illegal, and of such a nature as to induce the court to award restitution.

It has been urged in argument, that the *Ami de la Liberte* is the property of the *French* republic. The assertion is not warranted by the evidence; and if it was, would not, perhaps, be of any avail, so as to prevent restitution by the competent authority. The proof is clear and satisfactory, that she was an *American* vessel, owned by citizens of the *United States*, and still

still continues to be so. The evidence in support of her being *French* property is extremely weak and futile; it makes no impression, it merits no attention. But if the *Ami de la Liberté* be the property of the *French* Republic, it might admit of a doubt, whether it would be available, so as to legalise her captures and prevent restoration; because she was, after the sale (if any took place) to the republic, and before her departure from, and while she remained in, the *United States*, fitted out as an armed vessel of war; from whence in such capacity, and commanded by *Ballard*, an *American* citizen, she set sail, and made capture of vessels belonging to citizens of the *United Netherlands*. The *United States* would, perhaps, be bound, both by the law of nations and an express stipulation in their treaty with the *Dutch*, to restore such captured vessels, when brought within their jurisdiction, especially if they had not been proceeded upon to condemnation in the Admiralty of *France*. On this, however, I give no opinion. The *United States* are neutral in the present war; they take no part in it; they remain common friends to all the belligerent powers, not favoring the arms of one to the detriment of the others. An exact impartiality must mark their conduct towards the parties at war; for, if they favour one to the injury of the other, it would be a departure from pacific principles, and indicative of an hostile disposition. It would be a fraudulent neutrality. To this rule there is no exception, but what arises from the obligation of antecedent treaties, which ought to be religiously observed. If, therefore, the capture of the *Magdalena* was effected by *Ballard* alone, it must be pronounced to be illegal, and of course the decree of restitution is just and proper. This leads us,

II. To consider the capture as having been made by *Ballard* and *Talbot*. *Talbot* commanded the privateer *L'Ami de la Pointe à Pirre*. The question is, as the *Magdalena* struck to and was made prize of by *Ballard*, and as *Talbot*, who knew his situation, aided in his equipment, and acted in confederacy with him, afterwards had a sort of joint possession, whether *Talbot* can detain her as prize by virtue of his *French* commission? To support the validity of *Talbot's* claim it is contended, that *Ballard* had no commission or an inadequate one, and therefore his capture was illegal: That it was lawful for *Talbot* to take possession of the ship so captured, being a *Dutch* bottom, as the *United Netherlands* were at open war and enmity with the *French* republic, and *Talbot* was a naturalized *French* citizen, acting under a regular commission from the Governor of *Guadaloupe*. It has been already observed, that *Ballard* was a citizen of the *United States*; that the *Ami de la Liberté*, of which he had the command, was fitted out and armed as a vessel of war in the *United States*; that as such she sailed from the *United States*, and cruised against nations

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nations at peace and in amity with the said states. These acts were direct and daring violations of the principles of neutrality, and highly criminal by the law of nations. In effecting this state of things, how far was *Talbot* instrumental and active? What was his knowledge, his agency, his participation, his conduct in the business? It appears in evidence, that *Talbot* expected *Ballard* at *Tybee*; that he waited for him there several days; that he set sail without him, and in a short time returned to his former station. This indicates contrivance and a previous communication of designs. At length *Ballard* appeared. On his arrival, *Talbot* put on board the *Ami de la Liberte*, in *Savannah* river, and confessedly within the jurisdiction of the *United States*, four cannon, which he had brought for the purpose. Were these guns furnished by order of the *French* Consul? The insinuation is equally unfounded and dishonorable. They also fired a salute, and hailed *Sinclair*, a citizen of the *United States*, as an owner. An incident of this kind, at such a moment, has the effect of illumination. *Talbot* knew *Ballard's* situation, and in particular aided in fitting out the *Ami de la Liberte* by furnishing her with guns. Without this assistance she would not have been in a state for war. An essential part of the outfit, therefore, was provided by *Talbot*. The equipment being thus completed, the two privateers went to sea. When on the ocean, they acted in concert; they cruize together, they fought together, they captured together. *Talbot* knew that *Ballard* had no commission; he so states it in his claim: the facts confirm the statement; for, about an hour after *Ballard* had captured the *Magdalena*, he came up, and took a joint possession, hoping to cover the capture by his commission, and thus to legalize *Ballard's* spoliation. How silly and contemptible is cunning—how vile and debasing is fraud. In furnishing *Ballard* with guns, in aiding him to arm and outfit, in co-operating with him on the high seas, and using him as the instrument and means of capturing vessels, *Talbot* assumed a new character, and instead of pursuing his commission acted in opposition to it. If he was a *French* citizen, duly naturalized, and if, as such, he had a commission, fairly obtained, he was authorized to capture ships belonging to the enemies of the *French* Republic, but not warranted in seducing the citizens of neutral nations from their duty, and assisting them in committing depredations upon friendly powers. His commission did not authorize him to abet the predatory schemes of an illegal cruiser on the high seas; and if he undertook to do so, he unquestionably deviated from the path of duty. *Talbot* was an original trespasser, for he was concerned in the illegal outfit of the *Ami de la Liberte*. Shall he then reap any benefit from her captures, when brought within the



the *United States*? Besides, it is in evidence, that *Ballard* 1795. took possession first of the *Magdalena*, and put on board of her a prize-master and some hands; *Talbot*, in about an hour after, came up, and also put on board a prize-master, and other men. The possession in the first instance was *Ballard's*; he was not ousted of it; they prey was not taken from him; indeed, it was never intended to deprive him of it. So far from it, that it was an artifice to cover the booty. *Talbot's* possession was gained by a fraudulent cooperation with *Ballard*, a citizen of the *United States*, and was a mere fetch or contrivance in order to secure the capture. *Ballard* still continued in possession. The *Magdalena* thus taken and possessed, was carried into *Charleston*. Can there be a doubt with respect to restoration? Stating the case answers the question. It has been said that *Ballard* had a commission, and acted under it. The point has already been considered, and indeed is not worth debating; the commission, if any, was illegal, and of course the seizures were so. But then what effect has this upon *Talbot*? Does it make his case better or worse? The truth is, that *Talbot* knew that *Ballard* had no commission, and he also knew the precise case and situation of the *Ami de la Liberte*; to whom she belonged, where fitted out, and for what purpose. *Talbot* gave *Ballard* guns within the jurisdiction of the *United States*, and thus aided in making him an illegal cruizer; he comforted and acted with him, and was a participant in the iniquity and fraud. In short, *Ballard* took the *Magdalena*, had the possession of her, and kept it; *Talbot* was in under *Ballard* by connivance and fraud, not with a view to oust him of the prize, but to cover and secure it; not with a view to bring him into judgment as a transgressor against the law of nations, but to intercept the stroke of justice and prevent his being punished. If *Talbot* procured possession of the *Magdalena* through the medium of *Ballard*, a citizen of the *United States*, and then brought her within the jurisdiction of the said States, would it not be the duty of the competent authority to order her to be restored? The principle deducible from the law of nations, is plain;—you shall not make use of our neutral arm, to capture vessels of your enemies, but of our friends. If you do, and bring the captured vessels within our jurisdiction, restitution will be awarded. Both the powers, in the present instance, though enemies to each other, are friends of the *United States*; whose citizens ought to preserve a neutral attitude; and should not assist either party in their hostile operations. But if, as is agreed on all hands, *Ballard* first took possession of the *Magdalena*, and if he continued in possession, and brought her within the jurisdiction of the *United States*, which I take to be the case, then no question can arise with respect to the legality of

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of restitution. It is an act of justice, resulting from the law of nations, to restore to the friendly power the possession of his vessel, which a citizen of the *United States* illegally obtained, and to place *Joost Jansen*, the master of the *Magdalena*, in his former state, from whence he had been removed by the improper interference, and hostile demeanor of *Ballard*. Besides, it is right to conduct all cases of this kind, in such a manner, as that the persons guilty of fraud, should not gain by it. Hence the efficacy of the legal principle, that no man shall set up his own fraud or iniquity, as a ground of action or defence. This maxim applies forcibly to the present case, which, in my apprehension, is a fraud upon the principles of neutrality, a fraud upon the law of nations, and an insult, as well as a fraud, against the *United States*, and the Republic of *France*.

I am, therefore, of opinion, that the decree of the Circuit Court ought to be affirmed. Being clear on the preceding points, it supercedes the necessity of deciding upon other great questions in the cause; such as, whether *Redick* and *Talbot* were *French* citizens; whether the bill of sale was colourable and fraudulent; whether *Redick*, if a *French* citizen, did not lend his name as a cover; and whether the property did not continue in *Sinclair* and *Wilson*, citizens of the *United States*.

IREDELL, *Justice*.—In delivering my opinion on the great points arising in this case, I shall divide the consideration of it under the following heads:

1. Whether the District Court had jurisdiction *prima facie* upon the subject matter of the libel, taking for granted that the allegations in it were true.

2. Admitting that the court had jurisdiction *prima facie*, whether *William Talbot* had stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction and controul of the District Court.

I. The first enquiry is,

Whether the district Court had jurisdiction *prima facie* upon the subject matter of the libel, taking for granted that the allegations in it were true.

These allegations in substance are,

That the ship was taken on the high seas, by a schooner called *L'Ami de la Liberte*, commanded by *Edward Ballard*, who had no lawful commission, to take her as the property of an enemy of the *French* Republic, under whose authority the capture was alledged to be made.

That *William Talbot*, who came up after the surrender, and put some men on board, when the prize was in possession of *Ballard*, had also no lawful commission for the purpose of such a capture, being an American citizen, and his owners American citizens likewise.

That

That there was fraud and collusion between *Talbot* and *Ballard*, both vessels being in fact the property of the same owners, *Wilson* and *Sinclair*, who were American citizens. 1795.

Such, substantially, are the allegations of the libel, and admitting them to be true, nothing is more clear than that the capture was unlawful.

But it is objected that this is a question of *prize* or no *prize*, and whether the ship was lawfully a prize, or not, is for some court of the *French Republic* alone to determine, under whose authority *Ballard* and *Talbot* alledge they acted; and it is contended, that the capture in question being of a *Dutch* ship, and not an *American*, the *United States* have no right to decide a dispute between the *Dutch* and the *French*, in regard to a capture on the high seas, claimed as lawful by one party, and denied to be such by the other, since such an interposition would be equally a violation of the law of nations, and of the 17th article of the treaty with *France*.

To this objection, the following answers appear to me to be satisfactory:

1. That it is true, both by the law of nations, and the treaty with *France*, if a *French* privateer brings an enemy's ship into our ports, which she has taken as prize on the high seas, the *United States*, as a nation, have no right to detain her, or make any enquiry into the circumstances of the capture.

But this exemption from enquiry, by our courts of justice, in this respect, only belongs to a *French privateer*, lawfully commissioned, and, therefore, if a vessel claims that exemption, but does not appear to be duly entitled to it, it is the express duty of the court, upon application, to make enquiry, *whether she is the vessel she pretends to be*, since her title to such exemption depends on that very fact.

Otherwise, any vessel whatever, under a colour of that kind, might capture with impunity, and defy all enquiry, if she kept out of a *French* port, equally in violation of the law of nations, and insulting to the *French Republic*, which, from a regard to its own honour and a principle of justice, would undoubtedly disdain all piratical assistance. She might say, now, I trust, with as much truth as dignity, *Non tali auxilio, nec Defensoribus istis tempus eget*.

2. That such an enquiry being thus proper to be made, if upon the enquiry it shall appear, that the vessel pretending to be a lawful privateer, is really not such, but uses a colourable commission for the purposes of plunder, she is to be considered by the law of nations, so far at least as a transfer of property is concerned, or a title to hold it insisted upon, in the same light as having no commission at all.

3. That *prima facie* all piracies and trespasses committed against

1795. against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it.

It is expressly held, in an authority quoted 1 *Lex Mercatoria* 252. "That if a *Spaniard* robs a *Frenchman* on the high seas, their princes being both then in amity with the crown of *England*, and the ship is brought into a port in *England*, the *Frenchman* may proceed *criminaliter* against the *Spaniard*, to punish him, and *civiliter*, to have restitution of his vessel." The authorities referred to are, *Selden mare claus. Lib. 1 chap. 27. Grotius de Jure Belli et Pacis, b. 3. c. 9. f. 16.* both books of very high authority.

What is called robbery on the land, is piracy if committed at sea. 3 *Inst.* 113. 1 *Com. Dig.* 269. And as every robbery on land includes a trespass, so does every piracy at sea. 1 *Com. Dig.* 268. Consequently, if there be an unlawful taking, it may be piracy or trespass according to the circumstances of the case, both being equally unlawful, though one a higher species of offence than the other, which cannot alter the intrinsic illegality of the fact common to both, but only occasion a greater or less degree of punishment proportioned to the nature of the offence. It is, therefore, no answer to say, in bar of restitution, that no piracy has been committed, and therefore no restitution is to follow, since, if a trespass has been committed, though not a piracy, restitution is equally proper as if the offence had amounted to piracy itself.

4. That by a due consideration of the law of nations, whatever opinions may have prevailed formerly to the contrary, no hostilities of any kind, except in necessary self-defence, can lawfully be practised by one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority. War can alone be entered into by national authority; it is instituted for national purposes, and directed to national objects; and each individual on both sides is engaged in it as a member of the society to which he belongs, not from motives of personal malignity and ill will. He is not to fly like a tyger upon his prey, the moment he sees an individual of his enemy before him. Such savage nations, I believe, obtained formerly. Thank God, more rational ones have succeeded, and a liberal man can frequently see great integrity and honor on both sides, though different and irreconcilable views of national interest or principles may unfortunately engage two nations in hostility. Even in the case of one enemy against another enemy, therefore, there is no colour of justification for any offensive hostile act, unless it be authorized  
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by some act of the government giving the public constitutional function to it.

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5. That notwithstanding an apparent contrariety of opinions on this subject, it would be easy to shew, upon principle, if not by authority, that such hostility committed without public authority on the high seas, is not merely an offence against the nation of the individual committing the injury, but also against the law of nations, and, of course, cognizable in other countries: But that is not material in the present stage of the enquiry, which affects only the conduct of our own citizens in our own vessels, attacking and taking, under colour of a foreign commission, on the high seas, goods of our friends.

This is so palpable a violation of our own law (I mean the common law, of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since that has provided a particular manner of enforcing it,) as well as of the law of nations generally; that I cannot entertain the slightest doubt, but that upon the case of the libel, *prima facie*, the District Court had jurisdiction.

2. The next enquiry is,

Whether *William Talbot* has stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction of the District Court.

This claim is grounded as follows:

1. That at the time of his receiving the commission, and at the time of the capture, he was a real *French* citizen, and his vessel was *French* property, viz. the property of *Samuel Redick*, a *French* citizen at *Point-a-Pitre* in *Guadaloupe*.

2. That he had a lawful commission to cruise from the *French* Republic.

3. That whether *Ballard* had a lawful commission or not, he himself was lawfully entitled: 1. To part, if *Ballard* had a lawful commission, as having been in sight at the time of the capture, and therefore contributing to intimidate the enemy into a surrender upon the common principle. 2. If *Ballard* had no lawful commission, and is to be considered as a *pirate*, his capture did not change the property; of course, it remained *Dutch*, and he, as captain of a *French* privateer, had a right to seize and retain it.

The first point to be considered is,

Whether *Talbot* at the time of his receiving the commission, and at the time of the capture, was a *French* citizen.

This involves the great question as to the right of expatriation, upon which so much has been said in this cause. Perhaps it is not necessary it should be explicitly decided on this occasion; but I shall freely express my sentiments on the subject.

That

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That a man ought not to be a slave; that he should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country, and may live comfortably in another; are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognize.

The only difference of opinion is, as to the proper manner of executing this right.

Some hold, that it is a natural unalienable right in each individual; that it is a right upon which no act of legislation can lawfully be exercised, inasmuch as a legislature might impose dangerous restraints upon it; and, of course, it must be left to every man's will and pleasure, to go off, when, and in what manner, he pleases.

This opinion is deserving of more deference, because it appears to have the sanction of the Constitution of this state, if not of some other states in the Union.

I must, however, presume to differ from it, for the following reasons:

1. It is not the exercise of a natural right, in which the individual is to be considered as alone concerned. As every man is entitled to claim rights in society, which it is the duty of the society to protect; he, in his turn, is under a solemn obligation to discharge all those duties faithfully, which he owes, as a citizen, to the society of which he is a member, and as a man to the several members of the society individually with whom he is associated. Therefore, if he has been in the exercise of any public trust, for which he has not fully accounted, he ought not to leave the society until he has accounted for it. If he owes money, he ought not to quit the country, and carry all his property with him, without leave of his creditors. Many other cases might be put, shewing the importance of the public having some hold of him, until he has fairly performed all those duties which remain unperformed, before he can honestly abandon the society forever. But it is said, his ceasing to be a citizen, does not deprive the public, or any individual of it, of remedies in these respects: Yet the right of emigration is aid to carry with it the right of removing his family, and effects. What hold have they of him afterwards?

2. Some writers on the subject of expatriation say, a man shall not expatriate in a time of war, so as to do a prejudice to his country. But if it be a natural, unalienable, right, upon the footing of mere private will, who can say this shall not be exercised in time of war, as well as in time of peace, since the individual

individual, upon that principle, is to think of himself only? I 1795.  
 therefore, think, with one of the gentlemen for the defendant, that the principle goes to a state of war, as well as peace, and it must involve a time of the greatest public calamity, as well as the profoundest tranquillity.

3. The very statement of an exception *in time of war*, shews that the writers on the law of nations, upon the subject in general, plainly mean, not that it is a right to be always exercised without the least restraint of his own will and pleasure, but that it is a reasonable and moral right which every man ought to be allowed to exercise, with no other limitation than such as the public safety or interest requires, to which all private rights ought and must forever give way. And if in any government, principles of patriotism and public good ought to predominate over mere private inclination, surely they ought to do so in a Republic founded on the very basis of equal rights, to be perfectly enjoyed in every instance, where the public good does not require a restraint.

4. In some instances, *even in time of war*, expatriation may fairly be permitted. It ought not then to be restrained. But who is to permit it? The Legislature surely; the constant guardian of the public interest, where a new law is to be made, or an old one dispensed with. If they may take cognizance in one instance, (as for example, in time of war) because the public safety may require it, why not in any other instance, where the public safety, for some unknown cause, may equally require it? Upon the eve of a war, it may be still more important to exercise it, as we often see in case of embargoes.

5. The supposition; that the power may be abused, is of no importance, if the public good requires its exercise. This feverish jealousy, is a passion that can never be satisfied. No man denies the propriety of the Legislature having a taxative power. Suppose it should be seriously objected to, because the Legislature might tax to the amount of 19*s*. in the pound? They have the *power*, but does any man fear the exercise of it? A Legislature must possess every power necessary to the making of laws. When constructed as ours is, there is no danger of any material abuse. But a Legislature must be weak to the extreme verge of folly, to wish to retain any man as a citizen, whose heart and affections are fixed on a foreign country, in preference to his own. They would naturally wish to get rid of him as soon as they could, and, therefore, perhaps, the proper precaution would be, to restrain acts of banishment, (if such could be at all permitted) rather than to limit the legislative controul over expatriation. But is there no danger of abuse on the other side? Have not all the contentions about expatriation in the courts, arisen from a want of the exercise  
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1795. *of this very authority?* For, if the Legislature had prescribed a mode, every one would know, whether it had or had not been pursued, and *all rights, private as well as public, would be equally guarded*; but upon the present doctrine, no rights are secured, but those of the *expatriator* himself.

I, therefore, have no doubt, that when the question is in regard to a citizen of any country, whose constitution has not prohibited the exercise of the legislative power in this instance, it not only is a proper instance in which it may be exercised, but it is the duty of the Legislature to make such provision, and for my part, I have always thought the *Virginia* assembly shewed a very judicious foresight in this particular.

Whether the *Virginia* act of expatriation be now in force, is a question so important, that I would not wish unnecessarily to decide it. If it be, I have no doubt that a citizen of that State, cannot expatriate himself in any other manner. It seems most probable (but I think not certain) from this record, that *Talbot* was a citizen of *Virginia*. We are, however, undoubtedly to consider him as a citizen of the *United States*. Admitting he had a right to expatriate himself, without any law prescribing the method of his doing so, we surely must have some evidence that he had done it. There is none, but that he went to the *West Indies*, and took an oath to the *French* Republic, and became a citizen there. I do not think that merely taking such an oath, and being admitted a citizen there, in itself, is evidence of a *bona fide* expatriation, or completely discharges the obligations he owes to his own country. Had there been any restrictions by our own law on his quitting this country, could any act of a foreign country, operate as a repeal of these? Certainly not. When he goes there, they know nothing of him, perhaps, but from his own representation. He becomes a citizen of the new country, at his peril. The act is complete, if he has legally quitted his own; if not, it is subordinate to the allegiance he originally owed. By allegiance, I mean, that tie by which a citizen of the *United States* is bound as a member of the society. Did any man suppose, when the rights of citizenship were so freely and honorably bestowed on the unfortunate *Marquis de la Fayette*, that that absolved him, as a subject or citizen of his own country? It had only this effect, that whenever he came into this country, and chose to reside here, he was *ipso facto* to be deemed a citizen, without any thing farther. The same consequence, I think, would follow in respect to rights of citizenship, conferred by the *French* Republic, upon some illustrious characters, in our own, and other countries. If merely intended, as ingeniously suggested at the bar, that upon going to *France*, and performing the usual requisites, they should be then *French* citizens, where is the honour



honour of it?—Since any man may avail himself of an indiscriminate indulgence granted by law. Some disagreeable dilemmas, may be occasioned by this double citizenship, but the principles, as I have stated them, appear to me to be warranted by law and reason, and if any difficulties arise, they shew more strongly the importance of a law, regulating the exercise of the right in question.

His going to the *West Indies*, and taking an oath of allegiance there, considering it in itself, is an equivocal act. It might be done, with a view to relinquish his own country forever. It might be done, with a view to relinquish it for a time, in order to gain some temporary benefit by it. If the former, and this was clearly proved, it possibly might have the effect contended for. If the latter, it would shew, that he voluntarily submitted to the embarrassments of two distinct allegiances. He must make them as consistent as he can. By our treaty with *Holland*, any *American* citizen, cruising upon *Dutch* subjects, as commander of a privateer, under a foreign commission, is to be deemed a pirate. If he left *America*, for the very purpose of doing this, and became a *French* citizen, that he might have a colour for doing so, then his taking a *French* commission could not absolve him from a crime which he was committing in the very act of taking it, and of which the *French* government might not be aware, as they are not bound to take notice of any other treaties but their own. If he went, intending to reside there for a time, and to act under a commission, which he believed would, for the present, justify him, tho' this might excuse him from the guilt of piracy, it would not make such a contract lawful, because, in this case, even his intention was not to expatriate himself forever; and, consequently, he still remained an *American citizen*, and had no authority to take a commission at all. It surely is impossible for us to say, he meant a real expatriation, when his conduct *prima facie*, as much indicates a crime; as any thing else. If he had such an intention before he left this country, why not mention it? If a citizen of *Virginia*, and their act of expatriation was not in force, yet, surely, it prescribed as good a method of effecting it as any other, and his not pursuing this method, (if he really meant an expatriation) can be accounted for in no other manner, but that he was conscious, the vessel he was fitting out, was for the purpose of cruising, and would have been stoppt by the government, had his design of expatriation so plainly evinced it.

I therefore, must say, there is no evidence to satisfy me, that he ceased to be an *American* citizen, so as to be absolved from the duties he owed to his own country; and, among others, that duty of not cruising against the *Dutch*, in violation of the law of nations, generally, and of the treaty with *Holland*, in particular.

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My observations, as to *Talbot*, will, in a great measure, apply to *Redick*, who appears to have been a citizen of *Virginia*. There is no evidence to satisfy me, that he ceased to be an *American* citizen, and became a *French* citizen, absolved from the duty he owed, as a citizen, to his own country. There is nothing to shew this, but a residence of no long duration, in a *French* Island, his taking an oath to the *French* Republic, and being admitted a *French* citizen, which, for the reasons I have given, I do not think sufficient.

In addition to my other observations, I may add, how is it possible, upon this principle, for the public to know in what situation they stand, as to any one of these persons? It is not impossible, (I believe instances indeed have already happened of it) that an *American* citizen may go to some of the dominions of the *French*, become a *French* citizen for a time, enjoy all the benefits of such, and afterwards return to his own country, and claim, and enjoy, all the privileges of a citizen there, without the least possibility of the public knowing, otherwise than from accident, whether he has become a citizen of another government, or not. Suppose one of them was to insist on holding an estate in land, devised to him after his new citizenship, how could it be proved he was an alien?

Whether, therefore, the property of the privateer, was in *Redick*, or in *Wilson* and *Sinclair*, I think it was equally *American* property, tho' I confess, the weight of the evidence, impresses me strongly with a belief, that the property was *Wilson* and *Sinclair's*. And, in regard to the objection, that nothing they could say or do, or *Talbot* either, could affect *Redick*, I think, as *Talbot* appears as the agent of *Redick*, of whom we know nothing but through him, his declarations are to be regarded as *Redick's* own, and any declarations of *Wilson* or *Sinclair*, in his presence, and any of the conduct of either of them, sanctioned by him, must have the same effect, as if the declarations had been made in the presence of *Redick*, and such conduct sanctioned by himself.

I consider the proof of the commission sufficient, but deny its operation, as I consider the vessel to have been an *American* vessel, owned by an *American* or *Americans*, and with an *American* Captain on board.

I now proceed to enquire into the consequences of *Ballard's* capture, and *Talbot's* co-operation with him, tho' perhaps, upon my principles, it is not absolutely necessary.

1. *Ballard's* capture, I think, is clearly insupportable. Admitting him to have been expatriated, (which, if the *Virginia* law was in force, I think he was) he did not become a *French* citizen at all. Only one of the crew was a *Frenchman*. I think, all the rest were proved to be *Americans*, or *English*. She

was fitted out in the *United States*. The commission, if good at all, was of a temporary and secret nature, and seems to have been confined to a special purpose, to be executed within the *United States*. She certainly had no authority to cruise, that being specified in every commission of that nature. Whoever were her owners, she does not appear to have been *French* property. On the contrary, there is the highest possibility, that *Talbot's* and *Ballard's* vessels had the same owners. So conscious was he of the illegality of his conduct, that he even preferred no claim for the captured property. 1795.

2. *Talbot* (considering himself as master of a lawful privateer) claims upon two grounds: 1. Upon supposition of *Ballard's* being a lawful commission, he claims, as being in sight at the time of the capture. To this, it is sufficient to say, that it was not a lawful commission. 2. If *Ballard* had no lawful commission, he claims upon his independent right, alledging, that if *Ballard* had no lawful commission, the property was not changed to *Ballard*, and therefore he had a right to take.

This claim (if *Talbot's* was a lawful privateer) would undoubtedly be good, if he was not a confederate with *Ballard*. But it is clear, that he was, that he cruized before and after, in company with him, that he put guns on board of his vessel; and there is the strongest reason to believe, that they both belonged to the same owners. It is true, if *Talbot* had come up, ignorant of *Ballard's* authority, and inadvertently put men on board the prize in conjunction with *Ballard*, supposing he had a lawful commission, when in reality he had not, it might with some reason be contended, that *Talbot* should hold the prize. But, wilful ignorance, is never excuseable; when there is time to enquire, enquiry ought to be made. There is not, however, the least reason for supposing any ignorance in the case. He abetted *Ballard's* authority, such as it was. He acted in support of it, not in opposition to it. It does not appear that he ever questioned it, until after his arrival in *Charleston*. It was, therefore, a mere after-thought. A man having a commission, is *authorized*, but not *compelled*, to exercise it. His will must concur to make a capture under it. It does not appear, that he relied, at sea, upon his own force, but upon *Ballard's*; at least, in this instance, upon his own and *Ballard's* in conjunction. A man having a lawful commission, is authorized to cruise himself, and to cruise in company with others, having lawful authority. It does not authorize him to associate with pirates, or any unlawful depredators, on the high seas. If he does so, he departs from his commission, assumes a new character, which that does not authorize, and risks all the consequences of it. It is impossible that *Ballard* can be guilty of a crime,

1795. a crime, and *Talbot*, who associated with him, in the wilful commission of it, can be wholly innocent of it. A man can be guilty of no crime, in obeying a lawful commission. He, therefore, in this instance, if guilty of a crime, must be considered altogether detached from a rightful authority, which he abandoned, in search of the profit of an illegal adventure. If, at sea, he acted in support of *Ballard's* claim, how can he claim now, on the principle of that being insupportable? At sea, was the place for him to make his option. He has no right, after the prize is brought into port, to say—"I made a bad option there: I supported *Ballard's* claim, whereas I ought to have opposed it, and stood upon my own. I will now take this Dutch ship as a prize, by my own authority." For such, in effect, I take to be the substance of any claim, suggested after his arrival in port.

I therefore think, upon this ground, even admitting, that *Talbot's* was a rightful privateer, his claim is insupportable.

WILSON, *Justice*.—As I decided this cause in the Circuit Court, it gives me pleasure to be relieved from the necessity of giving any opinion on the appeal, by the unanimity of sentiment that prevails among the judges.

CUSHING, *Justice*.—The facts in this case, so far as they appear to me to be essential for forming an opinion, may be reduced to a very narrow compass. *Ballard*, the commander of a vessel, which was illegally fitted out in the *United States*, cruizes in company with *Talbot*, who alledges that he is a *French* citizen, and produces a *French* commission. *Ballard* captures the *Magdalena*, a *Dutch* prize; then *Talbot* joins him; and both, having put prize-masters on board, bring the prize into the harbour of *Charleston*. The questions arising on this statement are, simply, whether the capture, under such circumstances, is a violation of our treaty with *Holland*? And whether it is such a case of prize, at the courts of the *United States* can take cognizance of, consistently with the treaty between *America* and *France*? Now, the whole transaction at *Gaudaloupe*, as well as here, presents itself to my mind as fraudulent and collusive. But even supposing that *Talbot* was, *bona fide*, a *French* citizen, the other circumstances of the case are sufficient to render the capture void. It was, in truth, a capture by *Ballard*, who had no authority, or colour of authority, for his conduct. He was an *American* citizen; he had never left the *United States*; his vessel was owned by *American* citizens; and the commission, which he held by assignment, was granted by a *French* admiral, within the *United States*, to another person, for a particular purpose, but not for the purpose of capture. Then, shall not the property, which he has thus taken from a nation at peace with the *United States*, and brought

brought within our jurisdiction, be restored to its owners? 1795.  
Every principle of justice, law and policy, unite in decreeing the affirmative; and there is no positive compact with any power to prevent it.

On the important right of expatriation, I do not think it necessary to give an opinion; but the doctrine mentioned by *Heineccius*, seems to furnish a reasonable and satisfactory rule. The act of expatriation should be *bona fide*, and manifested, at least, by the emigrant's actual removal, with his family and effects, into another country. This, however, forms no part of the ground, on which I think the decree of the Circuit Court ought to be affirmed.

RUTLEDGE, *Chief Justice*.—The merits of the cause are so obvious, that I do not conceive there is much difficulty in pronouncing a fair and prompt decision, for affirming the decree of the Circuit Court.

The doctrine of expatriation is certainly of great magnitude; but it is not necessary to give an opinion upon it, in the present cause, there being no proof, that Captain *Talbot's* admission as a citizen of the *French Republic*, was with a view to relinquish his native country; and a man may, at the same time, enjoy the rights of citizenship under two governments.

It appears, upon the whole, that *Ballard's* vessel was illegally fitted out in the *United States*; and the weight of evidence satisfies my mind, that *Talbot's* vessel, which was originally *American* property, continued so at the time of the capture, notwithstanding all the fraudulent attempts to give it a different complexion. The capture, therefore, was a violation of the law of nations, and of the treaty with *Holland*. The court has a clear jurisdiction of the cause, upon the express authority of *Pelaches's Case*. 4. *Inst.* And every motive of good faith and justice must induce us to concur with the Circuit Court, in awarding restitution.

The Decree of the Circuit Court affirmed.

The Counsel for the Appellees, then moved the court to assess additional damages, which was opposed by *Dallas*, for the Appellant; and, after argument, the following order was made:

BY THE COURT: *Ordered*, that the decree of the Circuit Court of *South Carolina* district, pronounced on the 5th day of *November*, in the year of our Lord one thousand seven hundred and ninety-four, affirming the decree of the District Court of the same district, pronounced on the sixth day of *August*, in the year of our Lord one thousand seven hundred and ninety-four, be in all its parts established and affirmed. And it is further considered, ordered, adjudged and decreed, that the said *William Talbot*, the Plaintiff in error, do pay to the said *Joost*

1795. *Jansen*, the Defendant in error, in addition to the sum of one thousand seven hundred and fifty-five dollars fifty-three cents, for demurrage and interest, and eighty-two dollars for costs, in the decree of the said Circuit Court mentioned, demurrage for the detention and delay, of the said brigantine *Vrouw Christina Magdalena*, at the rate of nine dollars and thirty-three cents, lawful money of the *United States*, *per diem*, to be accounted from the fifth day of *November* last past, till the sixth day of *June* last, the day of the actual sale of the said brigantine, under the interlocutory order of this court, of the third day of *March* last past, to wit, for two hundred and thirteen days, a sum of nineteen hundred and eighty-seven dollars and twenty-nine cents; and also interest at the rate of seven per centum per annum, for two hundred and ninety days, on the sum of fifty-one thousand eight hundred and forty-five dollars, being the amount of the sales of the cargo of the said brigantine heretofore sold, by order and permission of the said District Court, and making a sum of two thousand eight hundred and eighty-three dollars and forty-two cents; and also a like sum of seven per centum per annum on the amount of sales of the said brigantine *Vrouw Christina Magdalena*, under the order of this court, that is to say, interest for seventy-seven days, on the sum of eighteen hundred and twenty dollars, from the said sixth day of *June* last, making the sum of twenty-six dollars and eighty-seven cents, the whole of which interest to be accounted to this day, and making together the sum of two thousand nine hundred and ten dollars twenty-nine cents, lawful money of the *United States*; and which said interest and demurrage, make together the sum of four thousand eight hundred and ninety-seven dollars fifty-eight cents, in addition to and exclusive of the demurrage interest and costs adjudged in the said Circuit Court of the *United States*, for *South Carolina* district; also nine-one dollars and ninety-three cents, for his costs and charges: and that the said *Joost Jansen* have execution of this judgment and decree by special mandate to the said Circuit Court, and process agreeable to the act of the Congress of the *United States*, in that case made and provided.

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